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No. 1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Petitioner,

v.

HUDSON RAPID TUBES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The decision of the New York Court of Appeals was rendered and the remittitur of the court issued on October 31, 1967 (A. 1-24, A. 151-53).* On motion of petitioner, the Court of Appeals recalled and amended the remittitur on December 7, 1967 (A. 154-55). The petition for a writ of certiorari was filed on January 26, 1968.

* This and similar references are to the consecutively paginated appendices (Appendix A through Appendix J) bound with the petition. References to the latter are abbreviated "Pet.", and the brief submitted by the State of New Jersey *amicus curiae* in support of the petition is cited "N.J. *Amicus* Br.". As in the petition, the printed transcript of the trial is cited by the abbreviation "Tr.".

Question Presented

Acting under the authority of bi-state legislation amending and supplementing an earlier compact, petitioner brought this proceeding in the Supreme Court of the State of New York to condemn respondent's property, an interstate rail rapid transit system, to continue its function as a vital commuter facility serving the northern New Jersey-New York metropolitan area. The New York Court of Appeals made its award in response to the requirements of "just compensation" embodied in the Constitutions of the States of New York and New Jersey and the United States Constitution. U. S. Const., amends. V, XIV; N. Y. Const., art. I, §7(a); N. J. Const., art. I, §20.

The question presented is whether a substantial federal question is raised as to the quantum of the award, on petitioner's argument "that any award for the condemnee's property in excess of scrap value would violate [a] Congressionally sanctioned bi-state legislative compact and would therefore be contrary to Article I, §10, Clause 3 of the Constitution of the United States" (A. 155) in that any such award would violate two provisions of the bi-state legislation:

> (i) that the owner of the property shall not be awarded any "increment" above constitutionally mandated "just compensation;" and
>
> (ii) that in a single action brought to condemn property located in both States, the court of the forum State shall apply the law of valuation of the other State with respect to the part of the condemned property located in that State.

Statement of the Proceedings

The property taken in this proceeding by Port Authority Trans-Hudson Corporation ("PATH"), a wholly owned subsidiary of The Port of New York Authority ("Port Authority"), is a subaqueous and subterranean rail rapid transit system providing trans-Hudson passenger transportation between northern New Jersey and New York City. The railroad was taken in its entirety as an operating entity to continue the same essential public utility service that it has rendered continuously for more than half a century.

Although financially unprofitable due to a reduction in traffic and revenue caused by the Port Authority's manifold creation of tax-exempt competitive vehicular bridge and tunnel facilities, the railroad has remained, as declared in the bi-state legislation directing its taking, "an essential railroad facility serving the northern New Jersey-New York metropolitan area." N. Y. Sess. Laws 1962, ch. 209, §1(3), N. Y. Unconsol. Laws §6601(3) (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §1(3), N. J. Rev. Stat. §32:1-35.50(3) (Supp. 1962-1963).*

* Petitioner's striving to suggest that at the time of condemnation the railroad was on the brink of "imminent cessation" of operations (Pet. 11; see Pet. 17) was duly recognized by the trial court's observation that any notion of the railroad's abandonment was "an impermissible dream" (A. 69). In approving the plan of reorganization under which the railroad assets were transferred to respondent shortly before condemnation, the District Court squarely rejected the argument that transferring the railroad assets to a new corporation was "tantamount to abandonment of the railroad," and stated that respondent would be "in a sound position to meet its obligations and will have adequate working capital to conduct its working operations." *Re Hudson & Manhattan R.R.*, 174 F. Supp. 148, 170, 171 (S.D.N.Y. 1959), *aff'd sub nom. Spitzer* v. *Stichman*, 278 F. 2d 402 (2d Cir. 1960). Although not earning net income after depreciation, the railroad had a cash operating throwoff (Tr. 3550-53).

The Hudson Tubes' indispensability in the annual transportation of 30,000,000 passengers, including one-fourth of all trans-Hudson commuters to New York City by all modes of travel during the critical morning peak hour, and one-half of all such commuters entering Manhattan south of the Lincoln Tunnel (A. 67-68), was duly emphasized by the New York Court of Appeals (A. 2), and has been repeatedly acknowledged by the Port Authority itself in statements *ante litem motam* that if the railroad were unavailable to carry so substantial a segment of the commuting public, "trans-Hudson vehicular facilities would be incapable of handling the passenger load" (Tr. 4720-21, 4723).

After a lengthy trial, in which it heard evidence as to the railroad's operations, the condition of its facilities, equipment and finances, and the cost of its creation and reproduction, the trial court (Supreme Court, New York County) made findings, neither reversed nor modified on appeal, that the railroad operated "regularly and satisfactorily" in "safe and sound condition at speed and spacing between trains equal to the performance of New York City subways" (A. 69, A. 112), that the "uncontroverted" reproduction cost less depreciation of the railroad was at least $447,600,000, and that the original cost of the facilities *in use* on the date of condemnation (September 1, 1962) was approximately $62,000,000 (A. 99, A. 108-109).

The trial court awarded $55,000,000 as just compensation (A. 127), of which $30,000,000 was attributed to the eight-mile complex of subaqueous and subterranean tunnels, "the most vital and important component of an operating trans-Hudson commuter rail system" (A. 126), which were found to be "sound and safe and have a utility as such into the distant and indefinite future" (A. 125).

On appeal, a sharply divided Appellate Division reduced the award for the entire railroad from $55,000,000 to $3,500,000. Two of the five justices accepted the simple

syllogism upon which petitioner has rested its entire case since the proceeding commenced nearly six years ago, that because "the railroad was incapable of profitable operations" as a private enterprise, "only scrap or salvage value should be allowed for its structures," despite the enormous investment in its facilities and despite the fact that those facilities were being taken for continued use (A. 41). One justice "concur[red] in the result but only with great reluctance" in an opinion which showed how unjust the result was (A. 47-49). Two justices vigorously dissented, one voting to affirm and the other to increase the award (A. 52-61).

The New York Court of Appeals reversed the Appellate Division and reinstated the trial court award of $30,000,000 for the subway and tunnel properties, reasoning that such an award "predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award considerably above or below that figure would be 'manifestly unjust' to the owner whose property is taken and the people who must pay the bill" (A. 9). The question of the quantum of just compensation for the non-tunnel property and for going concern value, which is not now before this Court, was remanded to the trial court for further consideration.

Petitioner's single contention throughout this proceeding—a contention it now seeks to carry to this Court—is that the sole consideration and determinative fact in arriving at "just compensation" for the condemned property was the railroad's unprofitability of operations, which, in petitioner's submission, dictated an award of only the amount which the broken-up pieces of the railroad would have brought as scrap, upon the theory that such an amount, derived from a fictional liquidation of the railroad and sale of its parts as junk, represented the value of the

railroad to the condemnee and its loss by reason of the taking. Any larger payment, it is contended, would represent an interdicted "value to the taker." With complete consistency and absolute devotion to this premise, the value petitioner attached to the tunnels and subways, "the most vital and important component" of the railroad system, was *minus* $100,000, because on a liquidation of the railroad the pieces of the tunnels could not be broken up and carted away and it would cost $100,000 to plug up the tunnels (A. 4n).

It was in addressing itself to this argument that the Court of Appeals asked:

> "Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some $32,000,000 to construct, which would cost in excess of $400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period?"

and answered:

> "We think not" (A. 8) (emphasis in the original).

The assigned ground for now bringing the argument to this Court is that any award for the railroad of more than scrap value would be an "increment" above "just compensation" and a departure from the valuation law of New Jersey, and hence would be a two-fold violation of the bi-state legislation and accordingly of the Compact Clause of the United States Constitution.*

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* The specific provisions of the bi-state legislation upon which petitioner rests its entire argument are the portions of Section 14 which provide that "[i]n any such action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs in the nonforum state . . ." and that "[t]he owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes

Reasons for Denying Certiorari

None of the reasons assigned by petitioner for granting the writ has validity. Indeed, all are spurious and ill conceal the strategem of simply seeking a review of the quantum of an award in a state court condemnation proceeding on a plaint by the condemnor that the award was excessive.

The reasons for denying the petition are many:

(1) The petition rests entirely upon the contention that the determination of "just compensation" in this case is a matter of statutory construction—a contention that is the frankest recognition that petitioner has no claim on this Court's jurisdiction under the Constitutions of New York or New Jersey or under any provision of the United States Constitution. But equally clearly, the New York court's determination of just compensation is not turned into a process of statutory construction, giving rise to a federal question, merely because the statute incorporates—what it could not alter or avoid—the constitutional requirement of "just compensation;" provides—as would also be assumed—that no "increment" above "just compensation" shall be awarded; and further provides that the determination of that compensation shall be made in accordance with the law of two States rather than one.

(2) The New York Court of Appeals did no more than perform its constitutional duty of determining "just compensation" in accordance with the "dominant consideration" enunciated by this Court in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950):

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of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever." N. Y. Sess. Laws 1962 ch. 209, §14, N. Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N. Y. Laws 1962, ch. 8, § 14, N. J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963).

"What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill" (A. 8). It did not consider awarding respondent any "increment" above "just compensation." The statutory provision against awarding an "increment" above just compensation, whatever its prompting and possible application, is not a talisman for coming to this Court for a review of the quantum of the award on an argument that the amount determined to be just compensation was excessive and thus an "increment" above just compensation in violation of the legislation. Nor is there any inflexible rule for the determination of "just compensation" or any rule that makes scrap value the measure of just compensation for the taking of a commercially unprofitable but essential public utility to continue its indispensable public service, so that any larger award would be excessive as a matter of law and reviewable by this Court as a violation of the statute.

(3) The New York Court of Appeals, far from disregarding the statutory provision respecting the application of New Jersey law, particularly heeded the mandate and, although unable to "state with certainty what approach our brethren on the New Jersey Supreme Court would take to this problem," decided the case as best it could in accordance with the view the New Jersey court would presumably adopt to avoid "the manifest injustice of awarding scrap value" (A. 11). The most that can be contended on the point, therefore, is that the New York court erred in its discernment of New Jersey law, which would be no ground for resort to this Court, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, 96 (1917); *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 (1903), nor a tenable basis for argument that New York has committed a breach of compact. Needless to say, the fact that the court of one State had the problem and duty

of determining and applying the law of another State does not cast this Court as the only authoritative exponent of that law.

(4) Petitioner's contention on the merits is so patently lacking in substance that it does not warrant this Court's consideration, even if the Court should otherwise be disposed to take the case. Petitioner's whole argument that the single fact of the railroad's unprofitability left no room for other considerations or for the exercise of any judicial judgment, but called automatically for taking scrap value as the amount of the award, is in the Court of Appeals' words "neither compelled nor warranted by precedent," but is "manifestly unjust" (A. 5, 9). Indeed, the argument is utterly inadmissible, for as this Court said in *Denver* v. *Denver Union Water Company,* 246 U. S. 178, 191 (1918): "It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value'."

(5) The case presents no "special and important reasons" for the exercise of this Court's discretionary certiorari jurisdiction. Rule 19(1). Its sole feature of any distinctiveness, that it involves property located in two States, would make a decision of little precedential value. The precedent would only establish a pattern for bringing to this Court, for determination of the quantum of an award, any condemnation proceeding brought by the Port Authority or for that matter any other compact agency. Petitioner's claim that the proceeding concerns a matter of "current national importance" (Pet. 31) is based on a single far-fetched reference to another case which involves entirely different legal issues and is not analogous at all.

I.

No question of construction of a compact was or is presented.

Petitioner's posing and phrasing the question here as one of statutory construction does not conceal the fact that the only question in the case, and the question petitioner seeks to bring to this Court for further consideration and final determination, is what amount is "just compensation" for the condemned property. Petitioner concedes as much when it states as the "critical question" in the case: "What are the parameters of the constitutional requirement of just compensation?" (Pet. 21)

That question cannot be given the guise of a question of statutory construction to bring the case within the ambit of the authority petitioner invokes as the support for its claim on this Court's jurisdiction. Indeed, it is the height of pretense to suggest that a question that cannot reach this Court as a constitutional question may be slipped in as a question of statutory construction because the constitutional requirement, which is independently controlling, is also incorporated in the statute by reference with no different effect.

In short, the statute, in so far as it specifies that "just compensation" shall be the determinant of the award, adds nothing to, and certainly can subtract nothing from, the constitutional requirement and composition of "just compensation." It is not claimed or suggested that in principle or result there could be any difference in the determination of "just compensation" depending on whether the statutory reference to "just compensation" is in or out of the statute. The whole of petitioner's argument as to what would constitute "just compensation," what is allowable and what is not, is drawn from constitutional cases. No case is cited or can be imagined where "just compensation" is a matter of statutory construction. The petition is nothing more

than an attempt to make a state statute a vehicle to impose on this Court an issue which in its nature and substance is not reviewable by this Court.*

The cases cited and relied on by petitioner can only be contrasted to the instant case.

Delaware River Joint Toll Bridge Commission v. *Colburn,* 310 U. S. 419 (1940), turned squarely upon interpretation of a compact, not upon the application of an independently operative constitutional principle to which the compact merely makes reference.** Thus, the certiorari principle enunciated in the *Colburn* case, that "the construction of such a compact . . . involves a federal 'title, right, privilege or immunity' which . . . may be reviewed here on certiorari" (310 U. S. at 427), cannot be stretched to confer jurisdiction in this case.

And equally clearly, there is no issue here presented as to the validity of the bi-state legislation or the underlying compact, as was presented in *Dyer* v. *Sims,* 341 U. S. 22

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* Certainly this Court will not determine whether an award by the courts of New York constitutes just compensation under the New York Constitution, *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 566 (1898), or under the New Jersey Constitution, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra* at 96 (1917). And while a taking of private property for public use without just compensation is "wanting in the due process of law secured by the Fourteenth Amendment," *Chicago, Burlington and Quincy R.R.* v. *Chicago,* 166 U. S. 226, 241 (1897), it has never been held or intimated by this Court that the Fourteenth Amendment may be invoked by a condemning state agency as a basis for protesting as excessive a condemnation award made by state courts. Indeed, petitioner makes no such claim, resting its entire argument as to both jurisdiction and the merits on the provisions of the 1962 "compact."

** In *Colburn,* this Court "address[ed itself] to the language of the compact" in resolving the underlying question of "whether the Compact of 1934 between New Jersey and Pennsylvania authorizing the construction of the bridge and its approaches excluded the application to petitioner of a New Jersey statute without which respondents would enjoy no right of recovery under New Jersey law." (310 U. S. at 428 and 425).

(1951) (see p. 21n, *infra*), upon which petitioner mistakenly relies.

In sum, there is not a semblance of a point that can be made that this case in any way involves a construction of, or a determination of rights or obligations under, a compact.*

II.

No question of awarding an "increment" above just compensation was or is presented.

Like the words "just compensation" in the statute, the word "increment" does not and could not qualify the constitutional requirement, the judicial function in determining the amount of the award, or the determination that should be made. *See United States* v. *New River Collieries,* 262 U. S. 341, 343-44 (1923); *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 327 (1893); *Baltimore & Ohio R.R.* v. *United States,* 298 U. S. 349, 368 (1936).

Patently the whole argument structured on the word "increment" in the statute is no more than a contention that the award was excessive, and the word "increment," like the words "just compensation," is seized upon as a makeweight in an attempt to make the quantum of the award reviewable by this Court.

If in some unimaginable way claimant had argued in the state courts that for some reason it was entitled to something above "just compensation" and the New York courts had agreed, petitioner's argument might rise to the tenuous. But there was never any question in this case

* When and how the argument was improvised is indicative of its substance. Petitioner did not as much as intimate that there might be such an issue as a construction or violation of the bi-state legislation at any time during the trial or in its briefs prior to the rendition of the trial court's decision. Only after the decision came down did petitioner, in excepting to the tentative decree, have the thought of throwing in an argument based on the Compact Clause. Even in the Court of Appeals, petitioner thought so little of the idea as to give it less than two pages in its 119-page brief, and the court with a proper sense of proportion did not refer to the suggestion in its opinion. The court, at petitioner's request, amended its remittitur to record that the court had "passed upon" and rejected petitioner's argument (A. 155).

except the amount that would constitute "just compensation;" neither side spoke except as to what would constitute "just compensation;" and the Court of Appeals undertook no more than its duty in determining the amount that would be "just compensation."

That the Court of Appeals was doing no more than its duty in response to fundamental principles of fairness and justice in determining just compensation, and was not awarding or considering awarding any "increment" above just compensation, is manifest from the reasoning and result of the court's decision. It recognized that there was no inflexible rule that could be applied to reach a magic number, and that it could not be the automation that petitioner claimed it should be and award no compensation at all, literally nothing for the entire tunnel complex that constituted the most vital part of the railroad system, and call that "just compensation." Like the trial court, which said that in its probing "to arrive at an award which is fair, just and equitable, all that can be expected is the attainment of substantial justice" (A. 132), the Court of Appeals spoke with a balance and decisiveness that is all that can be expected in a condemnation proceeding, when it said that "an award either considerably above or below that figure [$30,000,000 for the tunnels and subways] would be 'manifestly unjust' to the owner whose property is taken and the people who must pay the bill" (A. 9).

III.

There is no basis for the contention that the New York Court of Appeals "refused" to apply New Jersey law and thereby "violated" the statute.

There is no greater merit in petitioner's contention that the Court of Appeals "refused" to apply New Jersey law to the valuation of the portion of the railroad located in that State, and thereby "disregarded" and "violated" the bi-state legislation's provision for the application of New Jersey law (Pet. 25-28).

The Court of Appeals specifically noted and heeded the statutory mandate, citing and considering New Jersey cases (A. 11). The court naturally could not "state with certainty" what award the New Jersey Supreme Court would have made—no more could this Court—but said and did all that could be said and done under the circumstances: "We must, however, decide the case and we believe that because of the manifest injustice of awarding scrap value, it is not unreasonable to assume that the view we have taken would be adopted by that court" (*ibid.*).*

Petitioner could have divided the condemnation jurisdiction between the two States, but chose to avail itself of the statute's provision for bringing a "single action" in one State, with the concomitants that the highest court of that State had to render the final determination of any tendered question of the law of the non-forum State, and that, as provided in the statute, petitioner and claimant were "bound by the judgments" so rendered. N. Y. Sess. Laws 1962, ch. 209, §14, N. Y. Unconsol. Laws §6614 (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §14, N. J. Rev. Stat. §32:1-35.63 (Supp. 1962-1963).

The inability of the New York court to divine with certainty the judgment that would have been rendered in the sister State is no basis or reason for turning to this Court for the determination. There is no more of an opening into this Court or ground for seeking its intervention

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* New Jersey's suggestion that a "casual perusal" of the opinion "makes it crystal clear that the Court did not even endeavor to make a good faith attempt to perform these compact provisions" (N. J. *Amicus* Br. 12) is not just unfounded; it exceeds the bounds of responsible advocacy.

through the assertion that the quantum of the award represented a violation of the statute with respect to the application of New Jersey law than there is through the assertion that the quantum represented a violation as an "increment" above just compensation. Both contentions are groundless in the argument they come down to, that the statutory wording was understood to mean, what it could not constitutionally mean, that compensation was being legislatively fixed at "scrap" value, or less than nothing for the entire system of tunnels and subways.

At best the argument fails under *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra,* where Mr. Justice Holmes disposed of a like contention with the statement: "There is nothing to suggest that it [the Missouri Supreme Court] was not candidly construing the Colorado statutes to the best of its ability, and even if it were wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article IV, §1." (243 U. S. at 96); see also *Johnson* v. *New York Life Ins. Co., supra* at 496.

Even if this Court were to pass judgment on the Court of Appeals' interpretation of New Jersey law, that interpretation could not be found to be erroneous. The courts of New Jersey have never had occasion to determine just compensation for utility property condemned to be continued in operation. They have, however, recognized that in applying the constitutional mandate of just compensation in individual cases, "at best we can only attain a measure of flexibility in the variety of circumstances that may arise," *State* v. *Burnett,* 24 N. J. 280, 288, 131 A. 2d 765, 769 (1957), and have further recognized that condemnation of "the entire plant of a public service corporation . . . with the purpose of continuing its operation as a governmental enterprise" presents "a specialized situation," in which "the plant is to be valued as a going

concern." *City of Trenton* v. *Lenzner*, 16 N. J. 465, 477, 109 A. 2d 409, 415 (1954), *cert. denied*, 348 U. S. 972 (1955).

At no time in the proceedings below did petitioner suggest that New Jersey law differs in its application to this case from New York law, and it ill behooves petitioner to chide the trial court for having failed to "mention a single New Jersey decision" (Pet. 14), when petitioner itself did not discuss or cite in its voluminous post-trial briefs any of the New Jersey cases upon which it now relies. Petitioner's first citation of New Jersey cases and argument based on New Jersey law came only after the trial court's decision, with the after-thought that the statute might be assigned the burden of carrying petitioner's argument that "scrap value" was "just compensation" as a matter of law.*

IV.

There is no merit in petitioner's contention that scrap value is "just compensation" as a matter of law.

While the office of this brief is to deal with jurisdictional questions rather than with the merits of the determination of "just compensation" made, some brief reference to the latter is justified by the fact that the petition is mainly devoted to the merits—which itself demonstrates that petitioner is seeking a review of the quantum of the award, rather than raising any question of "construction" of a compact.

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* It was not until after the trial court had rendered a decision that petitioner, objecting to the tentative decree, unearthed the case of *Currie* v. *Waverly & N.Y.B.R.R.*, 52 N.J.L. 381, 20 Atl. 56 (N. J. Ct. Err. & App. 1890), which it now holds out as "the leading New Jersey authority on the question . . ." (Pet. 27). The *Currie* decision involved vacant, unimproved land condemned for use as a railroad right-of-way, not an existing operating railroad taken to be continued in operation.

We beg to say just three things on the merits, which are dispositive of the underlying contention that scrap value was "just compensation" as a matter of law, according to which the only relevant evidence or allowable considerations in determining "just compensation" would be the income statement of the railroad and expert testimony of a junk dealer.*

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* Petitioner's highly edited "Statement" (Pet. 5-18), and its preoccupation with a reorganization which was consummated before condemnation, rather than with the evidence in this proceeding, manage to avoid the salient facts and give an altogether false impression. Its references to the bi-state legislation omit the basic legislative findings that underlie the case—that "rail services are and will remain of extreme importance" in providing commuter transportation that is essential to the economic preservation of the northern New Jersey-New York metropolitan area and that the Hudson Tubes "is an essential railroad facility." N. Y. Sess. Laws 1962, ch. 209, §1(3), N. Y. Unconsol. Laws §6601(3) (McKinney Supp. 1967); N. J. Laws 1962, ch. 8, §1(3), N. J. Rev. Stat. §32:1-35.50(3) (Supp. 1962-1963). Petitioner's studied derogation of the railroad flies in the face of the undisputed facts, found by the trial court, that the railroad when condemned was "operating satisfactorily in safe and sound condition at speed and spacing between trains equal to the performance of New York City subways" and that the tunnels, "the most vital and important component of an operating trans-Hudson commuter rail system," have "a utility as such into the distant and indefinite future" (A. 69, A. 125-26). As the Court of Appeals noted, an expenditure of only $88,000 was required to put the entire eight-mile complex of tunnels and subways in "perfect working order" (A. 4). The trial court aptly observed with respect to petitioner's whole position that it betrays "a blindness which refuses to credit the reality of this railroad system as one integrated, vital and in use" (A. 130).

Even petitioner's references to the concluded reorganization proceedings, with their emphasis upon the "engineers' value" given therein (Pet. 9), fail to state the one fact of any significance, if relevance at all can be found in those proceedings, namely, that the engineers expressed the opinion—on the basis of a rough and short-cut estimate of reproduction cost which was less than half of what that cost turned out to be when detailed engineering studies were actually made—that a reasonable price to be paid for the railroad by a public authority on a negotiated purchase would be between $25,000,000 and $35,000,000 (PATH Exh. 203 id., p. 64).

Finally, it is surprising that petitioner should address to this Court the *ad hominem* argument that "just compensation" for the property taken is "unjust enrichment of speculator interests" (Pet. 24). This interjection purports to find support in the opinion of Justice Steuer

First, the petition's citation of numerous decisions claimed to set forth "the principles of just compensation as they had been established" (Pet. 19) cannot obscure the fact that no court has ever held that scrap value would be just compensation for an operating utility condemned for continuation in the same use, whether or not profitable. To the contrary, the proposition has been rejected wherever and whenever it has been advanced. *Matter of City of New York (Fifth Avenue Coach Lines)*, 23 App. Div. 2d 463 (First Dep't 1965), *modified on other grounds*, 18 N. Y. 2d 212 (1966) *appeal dismissed*, 386 U. S. 778 (1967); *Re City of Oroville*, P.U.R. 1922E 451 (Cal. R.R. Comm'n); *Re City of Eureka*, 19 Cal. R.R. Comm'n Dec. 952 (Cal. R.R. Comm'n 1921); *International Ry.* v. *Niagara Parks Comm'n* [1937] 3 D.L.R. 305 (Privy Council); *Re City of Peterborough and Peterborough Electric Light and Power Co.*, 52 Ont. L. Rep. 9 (App. Div. 1916); see *Denver* v. *Denver Union Water Co.*, quoted at p. 9, *supra*.

Second, the cases upon which petitioner relies (Pet. 19-23) as proscribing any consideration of "gain to the condemnor" are beside the point, for they refer to "*a value which the government itself created* and hence in fairness should not be required to pay," *United States* v. *Cors*, 337 U. S. 325, 334 (1949) (emphasis added), and are in "sharp contrast," as the Court of Appeals put it, to the case presented by the Hudson Tubes of "property which has *a usefulness created by the owner himself* through the expenditure of large sums of money and by the continued

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in the Appellate Division, which was demonstrably mistaken in its statement that the beneficiaries of the award will not be "the people whose investment built the road," but various classes of creditors who became stockholders (A. 52). On consummation of the plan of reorganization, the entire equity ownership of the railroad was vested in the bondholders, who were the very people "whose investment built the road" and carried it to the day the States elected to take it over to continue its historic essential service.

operation of the property for the very purpose for which the petitioner is acquiring the property" (A. 5-6) (emphasis added). Here, rather than some "enhanced" value due to the taking, it was the *inherent* value of the property, which would not be recognized by the "manifest injustice" of an award of scrap value, that the trial court and Court of Appeals necessarily considered.

Third, the award made and confirmed by the Court of Appeals was in no sense based "on the value of the railroad to the public" (Pet. 2). That value, just for the tunnels and subways which are the only property before this Court, would certainly be related to reproduction cost, which the Court of Appeals noted as being "in excess of $400,000,000" (A. 4). The award of an amount less than original cost of the tunnel and subway property actually in use, particularly considering that the tunnels "with some minor expenditures, will function as good as new for an indefinite period" (A. 8), and less than one-tenth of reproduction cost less depreciation, was no assessment of "value to the taker," but a conscientious judicial response to the mandate of determining "[w]hat compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *United States* v. *Commodities Trading Corp., supra* at 123; see also *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 631 (1961); *Matter of City of New York* (*Fifth Avenue Coach Lines*), *supra.**

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* Petitioner dissembles when it attempts to create an appearance that the Court of Appeals "refused to follow" what it "recognized to be the law" and "traditional rule"—"that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained"—and instead held that "the owner must be paid not for his economic loss, but for the public gain resulting from the taking" (Pet. 5, 16-17). The Court of Appeals did nothing of the kind. Rather, what it referred to as the "traditional rule" that has "normally been accepted as a just standard" is to award "market value," *i.e.*, "the sum of money which [the owner] could have

V.

The case presents no special and important reasons for granting certiorari.

This case presents no "special and important reasons" for the exercise of this Court's discretionary certiorari jurisdiction. Rule 19(1). The only aspect of the case that makes it at all distinctive—the fact that it involves property located in two States condemned in a single proceeding under the authority of identical bi-state legislation—raises no federal question, as has been shown in Points I, II and III. No precedential value can be perceived in any decision this Court might render, and it is the grossest of exaggerations to suggest, as the petition and New Jersey's *amicus* brief warn, that "the integrity and future viability of interstate compacts are at stake" (Pet. 18; N. J. *Amicus* Br. 4). The case does not involve an interpretation, much less the integrity or validity, of even this

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realized in an uncoerced sale in the open market to a willing buyer" (A. 5-6), and what it said, quoting this Court, was that no "rigid rule" exists or can be dogmatically applied, and "when the market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public, courts have fashioned and applied other standards" (A. 6). And, again quoting this Court as to the guiding principle and objective, the Court of Appeals sought exactly what it should have sought, a result that was " 'just' both to an owner whose property is taken and to the public that must pay the bill" (A. 8). The court then put petitioner's position to the test: "Can it be said by any objective standard that an award of scrap value—*nothing*—is fair and just for the tunnel property, an essential part of an essential public facility, which cost some $32,000,000 to construct, which would cost in excess of $400,000,000 to reproduce and which, with some minor expenditures, will function as good as new for an indefinite period?" "We think not," the court answered (*ibid.*) (emphasis in the original). Finally, far from taking the "public gain" or "value to the taker" as the amount of the award, as petitioner without any warrant states the court did, the court accepted the trial court's conclusion, with respect to the tunnels, that it would be "fair and just" that "the condemnees should at least be repaid for the depreciated original cost of the tunnels" (A. 9). Anything less would have been, as the court said, "manifestly unjust."

one legislative amendment to the 1921 Compact, and it cannot seriously be thought to have any implications for the law of interstate compacts generally.*

The present case does not assume "current national importance" (Pet. 31) because it involves the public acquisition of a railroad. Petitioner has not pointed to any pending or contemplated proceedings to condemn commuter rail facilities which might be affected by the Court of Appeals' decision. Resolution of the challenge recently made to the Interstate Commerce Commission's decision approving terms for the inclusion of the New Haven Railroad in the Penn-Central system, on which alone the petition relies as demonstrating the supposed national importance of this litigation (Pet. 31), is not likely to be influenced by the decision in this case, for the ICC's determination turned upon the specific statutory criteria of Section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2) (1964), and Section 77(e) of the Bankruptcy Act, 11 U.S.C. §205(e) (1964), rather than the constitutional yardstick of just compensation in eminent domain.**

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* Compare *Dyer* v. *Sims, supra,* reviewing and reversing a decision of the Supreme Court of Appeals of West Virginia which had held the latter State's participation in the Ohio River Valley Sanitation Compact to be unconstitutional, largely upon the ground that it involved an impermissible delegation by the Legislature of the state police power. *Dyer* v. *Sims,* 134 W.Va. 278, 294-98, 58 S.E. 2d 766, 775-77 (1950). New Jersey's *amicus* brief lists ten compacts to which the State is a party, a fact which may be of academic interest but holds no significance whatever for this case, fo. none of the compacts contains language even remotely comparable to the provisions upon which petitioner relies here.

** Not once in its lengthy opinion approving terms for the New Haven's inclusion did the ICC cite the Court of Appeals decision in this proceeding. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.,* I.C.C. Finance Docket No. 21989 (Nov. 16, 1967). That the decision has been cited in a complaint challenging the ICC's action (*The Chase Manhattan Bank* v. *United States and Interstate Commerce Commission,* 68 Civ. 306 [S.D.N.Y., complaint filed Jan. 23, 1968]) is not of moment, particularly when the citation

And New Jersey's ever so far-fetched conjuring of "a problem of federal law" in the threat it sees in the Court of Appeals' decision to the Urban Mass Transportation Act of 1964, 49 U.S.C. §§1601-11 (1964), is revealing only of the amazing view the State seems to entertain that the Act cannot be effectuated if, as the statute requires, "just and adequate compensation" is paid for property taken (N. J. *Amicus* Br. 4-5, 14-15).

Finally, the case does not achieve significance because New Jersey is attempting in an original action, *New Jersey* v. *New York and Hudson Rapid Tubes Corporation*, No. 34, Original (October Term; 1967, motion for leave to file complaint filed Jan. 22, 1968), to raise the same issues and make the same arguments as the petition and New Jersey's *amicus* brief advance. A nonexistent issue does not materialize, nor does an insubstantial issue become substantial, because it is uttered by two voices rather than one or because one of the voices is that of a State.

Respondent is simultaneously herewith filing a brief in opposition in the original action, setting forth the many reasons why that action is not in order and why the Court should decline to exercise its original jurisdiction. The significance to be found in the extraordinary attempt to invoke this Court's original jurisdiction is its tacit admission of the insubstantiality of the petition for a writ of certiorari.

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relates only to the issue of going concern value (Pet. 32-33), which has been remanded by the Court of Appeals and is not involved in the pending petition. Even if this case held any significance for the New Haven proceeding and if that significance were misconceived by the three-judge District Court which has been empanelled, the matter could be righted by this Court on direct appeal. 28 U.S.C. §1253 (1964).

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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